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Supreme Court, U.S.
FILED

961511 MAR 24 1997

No. OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1996

MARGARET L. O'DELL

Petitioner,

v.

CYNTHIA METZLER, ACTING SECRETARY,
DEPARTMENT OF LABOR AND THE
UNITED STATES GOVERNMENT

Respondents

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

Whether the court can find the Federal Employees Compensation Act (FECA) 5 USCA § 8101 et seq, unconstitutional as (1) judicial review, a fundamental right, is denied for adverse decisions of the Office of Workers' Compensation Programs (OWCP) claims, thus, not providing for due process of law and equal protection of law essential for clarity and finality in the OWCP claims process and a check on arbitrary and capricious political decisions, and (2) what is taking place in the OWCP is amoral and unethical and those responsible for it must be held responsible and be fined and/or imprisoned as the Plaintiff would be if she were frauding her claim.

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None Cited.

OPINIONS BELOW

The United States District Court for the Middle District of Pennsylvania entered an opinion and order granting the Defendant's Motion to Dismiss on July 31, 1966 which opinion is unreported and appears at page 1.

The United States Court of Appeals for the Third Circuit affirmed the Order of the district judge on December 23, 1996 which is unreported and appears at page 8.

JURISDICTIONAL STATEMENT

The court of appeals affirmed the order of the district judge on December 23, 1966. Jurisdiction of this court is proper under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth and Fourteenth Amendments, Due Process Clause:

Two such clauses are found in the

> U.S. Constitution, one in 5th Amendment pertaining to the federal government, the other in the 14th Amendment which protects persons from state actions. There are two aspects: procedural, in which a person is guaranteed fair procedures and substantive, which protects a person's property from unfair government interference. Similar clauses are in most state constitutions.
>
> No person shall . . . deprived of life, liberty, or property without due process of law . . . .

Equal Protection of the Law:

> The constuitutional guarantee of "equal protection of the laws" means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty, property, and in their pursuit of happiness.

STATEMENT OF THE CASE

Plaintiff, Margaret L. O'Dell, while employed as Assistant Chief, Nursing Service, Veterans Administration Medical Center, Lebanon, Pennsylvania, was exposed to toxic fumes, vapors, and other pollutants in

her office intermittently ~~in~~ her office for her entire period-of- employment from Septamber 13, 1987 to February 1, 1989. She sustained an acute exposure on October 13, 1988 which resulted in her being diagnosed with Asthma and Reactive Airways Dysfunction Syndrome (RADS) consistent with her exposure(s). The Plaintiff never had any prior lung disease.

The problem with her office was known before she was housed there as others had also experienced health problems. There was a cover-up of the existence of a engineering carpenter workshop located directly below her office in the basement of the Psychiatric Building where an industrial operation was being carried-out. The Plaintiff and her secretary had continually complained of strong odors in their office complex but to no

avail. The engineers and safety officer stated they were investigating but never came up with a source. The Plaintiff out of necessity had to investigate the problem finding the workshop. The Plaintiff's secretary was diagnosed with Occupational Asthma from her exposures.

The Plaintiff resigned her position as she knew she was compromising her health and safety. She had hoped her lung disease would stabilize once she left employment there, however, her symptoms persisted necessitating continuing follow-up for evolving lung disease.

The Plaintiff sought workers' compensation after leaving her position and realizing she would require follow-up. She never intended to seek this compensation but she had no choice. In fact, her workers' compensation was

rejected the first time because she had not submitted any medical documentation although she could have. An Occupational Accident Report was made out after her acute exposure which was signed by her boss, the Chief, Nursing Service and was witnessed by her secretary. Her workers' compensation was accepted as an exposure to toxic fumes in her office on April 4, 1989 with no disclaimer.

The medical bills were paid for her inital testing and evaluation and thereafter the absurd, deceptive, and unfair modus operandi started with the processing of her claim by the OWCP and ECAB which continued throughout the entire processing of her claim. It got so preposterous by 1995 that the Plaintiff concluded it was futile for her to continue. The OWCP and ECAB were violating the provisions of the statute

and their own policies and procedures. The Plaintiff knew her only recourse was to challenge the constitutionality of the statute as she was being denied due process and being treated differently from other injured employees. This was all so wrong and there was nothing she could do about. She had exhausted every possible resource for solving her problem but to no avail. She was told it was the Congress of the United States that was responsible for what was taking place in this program.

The FECA statute was to be a quid pro quo in that the injured employee gave up their right of judicial review for the acceptance of their claim on reasonable probative value. If there was a question of probative value; the presumption was to be given to the injured employee. It was not meant to

be "beyond a shadow of a doubt" but rather "more likely than not." The Plaintiff's physicians felt this criteria was met. There was to be a mutual relationship between the injured employee and the OWCP not an adversarial one as the Plaintiff experienced. This statute has been bastardized and made into something it was never meant to be. If the President or the Congress of the United States wanted to change the provisions of the FECA statute, then, they should have legislated these changes into law not arbitrarily and capriciously decide to change them which has been devastating for many injured employees.

The Plsintiff's research revealed that former President Reagan sent out the edict to deny as many valid claims as possible. It was stated in a Congressional Record given the Plain-

tiff by former Congressman, Austin J. Murphy, Pennsylvania, that President Reagan wanted the claims examiners to be as mean as "Junkyard Dogs."

Former Congressman Mike Kreidler, Washington, wanted to introduce legislation during the 103rd Congress to address the immediate changes needed in the FECA statute and a comprehensive review of the entire statute something that had not been done for many years. He saw judicial review as a fundamental right for the injured employee to access the court to provide for clarity and finality in the OWCP process. Mr. Kreidler had three Bills he wanted legislated into law on an immediate basis to consist of:

- H.R. 4977, To change the appeals process in the workers'compensation provisions of Title 5, United States Code,
- H.R. 4978. To require the administrative agency respon-

sible for adjudicating claims under the workers' compensation provisions of Title 5, United States Code, to follow certain procedurtes in seeking medical opinions, and

. H.R. 4979, To require the administrative agency responsible for adjudicating claims under the workers' compensation provision of Title 5, United States Code, to select board certified physicians to provide second opinions.

The Plaintiff included copies of the three Biils in her Complaint to the Court as Exhibit 46.

Copies were also sent to Congressman, William F. Goodling, Chairman, Economic and Educational Opportunities Committee at the beginning of the 104th Congress to apprise him of the proposed legislation. Mr. Kreidler was not re-elected to the Congress in 1994. Mr. Goodling is responsible for oversight of the workers' compensation program. Mr. Goodling did not address the problem during 104th Congress although

there have been a plethora of complaints over the years. It seems that Mr. Goodling is more interested in legislation for the humane treatment of horses going to be slaughtered than the humane treatment of injured federal employees. The Plaintiff is sure that Mr. Goodling was aware of the problem as he served on the Labor and Human Resources Committee now the Economic and Educational Opportunities Committeee who had oversight of the workers' compensation program. The Plaintiff sent him, a very comprehensive, detailed, and documented report of her problem with the processing of her claim. A copy of this report is in the Complaint submitted to the district court.

REASONS FOR GRANTING THE WRIT

The Plaintiff believes this court should grant a writ of certiorari to

decide the constitutionality of the FECA statute as it denies judicial review a fundamental right, to access the court for adverse denial of her OWCP claim. Without access to the court she is being denied due process and equal protection of law and will be unable to get a fair decision for providing clarity and finality of her OWCP claim. Writ of Mandamus is also prohibited under the FECA so even if one did bring a civil action under Section 8128; the district judge would not be able to mandate to the agency that they correct the wrong done to the injured employee.

There never was any reason for denying the claim once it was accepted as an exposure to toxic fumes on April 4, 1989. All the reasons for denial were refuted by her physicians. But for, the deception carried-out by the

OWCP and ECAB her claim would have never been denied. Once a claim is accepted, the burden of proof then goes to the OWCP to disprove its credibility; they have never done this. The reason for the denial of the claim on August 27, 1990 was speculative and not grounded in fact as was shown by documentation but they refused to accept it. The Plaintiff under constitutional law, substantive due process, has a property right to her workers' compensation benefits.

The Plaintiff is one of the many injured employees who have been wronged in this process which has been devastating for some. The FECA statute was intended to prevent the courts from having a flood of small claims. The Congress might see workers' compensation as small claims but to the Claimant it might mean survival. One

can but question why they would have thought that the courts would be flooded with samll claims in the first place? It would seem that if they were; it would have served as an indicator of probems with the program that needed reform.

Injured federal employees are the the only employees in our nation denied access to the court for adverse denial of their workers' compensation benefits. They are being treated differently than other similar employee groups, thus, are being denied equal protection of law.

The Plaintiff did not cite any cases as she could not find any that would have provided for fairness based on the unique circumstances of her complicated case. She knows that she was the victim of a tort, but also, realized that her only compensation was

under the FECA as the statute prohibits dual compensation. This is another issue that needs to be addressed by the Congress. Nobody should be wrongfully injured and then denied due compensation for that injury. Also, where there is no responsibility and accountability by federal administrators; it set-up the environment conducive for abuse.

The Plaintiff does not agree with information provided by the district judge as he errored in not stating that the Plaintiff's claim was accepted on April 4, 1989. One would reach the conclusion based on what he reported that the claim had never been accepted except for the partial acceptence on March 1, 1996 which was later denied by the Director of the OWCP on March 29, 1996. She but questions if the district

judge read the information with documentation presented him?

The Director of the OWCP, Philadelphia, Pennsylvania, refused to accept a documented "error of fact" which resulted in the ECAB not evaluating Dr. Clifford S, Mitchell's medical report of September 30, 1993. The Plaintiff sought legal counsel in this matter. The lawyer, also, saw it as an "error of fact" but this meant nothing to the OWCP or ECAB. It has been almost 4 years now and it still has not been evaluated on appeal.

The Plaintiff has been depraved and feels totally victimized by this fraudulent system for which there is no justice for her without judicial review.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that her petition for writ of certiorari be granted.

Respectfully,

Margaret L. O'Dell

Margaret L. O'Dell
Petitioner and Pro Se Litigant

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARGARET L. O'DELL :
Plaintiff

:

vs. : CIVIL ACTION
NO.1:CV-96-270
MEMORANDUM

ROBERT B. REICH, :OPINION & ORDER
Secretary Dept.
Labor, of U.S. Govern-:
ment; UNITED STATES
GOVERNMENT; :
Defendants

MEMORANDUM

Plaintiff alleges that she was exposed to toxic fumes at the Veterans's Administration Medical Center in Lebanon, Pennsylvania on October 13, 1988. Thereafter, she made a claim for benefits under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8101 et. seq., which was denied. In this action, Plaintiff seeks to have this court review that denial to determine whether she met the criteria for the recovery

of benefits. However, because FECA expressly precludes judicial review of a decision to allow or deny benefits, Plaintiff contends that the statute is unconstitutional and violates her rights under the Fifth and Fourteenth Amendments. We are considering the Defendant's motion to dismiss and, for the reasons that the follow, the motion will be granted.

I. BACKGROUND

The FECA, which is administered by the Secretary of Labor through ther Office of Wowkers' Compensation Programs ("OWCP"), provides compensation to federal employees who are disabled in the performance of a duty. It is the exclusive remedy available for federal employees against the United States for such injuries.

An employee who makes a claim

under FECA must establish that his or her disability was "caused, aggravated, or adversely affected by the claimant's Federal employment." 20 C.F.R. § 10.110(a). The OWCP, through a claims examiner, then renders a decision on the claim.

A claimant who is dissatisfied with the decisicn can request a hearing before OWCP representative, at which time the claimant can submit additional evidence. That decision is then subject to review by the OWCP uopn its own motion, or upon the claimant's request if the shows that the OWCP erroneously applied or interpreted a point of law, advance a point of law or fact not previously considered by the OWCP, or submits relevant evidence not previously considered. Any decision in the above process may be directly

appealed to the Employees' Compensation Appeals Board ("ECAB"), which performs a review solely on the evidence before the OWCP.

We turn now to the facts of the instant case. On October 18, 1988, Plaintiff filed a claim for compensation, alleging that on October 13, 1988, she inhaled toxic fumes from an area located below her office. The claim was denied. Plaintiff then submitted new evidence to the OWCP, but was again. Thereafter, she requested a hearing before an OWCP representative, where her claim was again denied.

After a series of unsuccessful requests for reconsideration, Plaintiff appealed to ECAB and, on June 3, 1993, The ECAB affirmed the decision of the OWCP. Plaintiff then submitted more evidence to the OWCP, but her claim was rejected. She again

appealed to the ECAB, which affirmed the decision of the OWCP.

On November 29, 1995, Plaintiff asked OWCP to reconsider her claim, and on March 1, 1996, the motion was granted in part. However, the Director of the OWCP reversed the decsion on his own motion on March 29, 1996, and denied Plaintiff's claim.

II. LAW AND DISCUSSION

Defendants argue and Plaintiff does not dispute, that FECA precludes judicial review of a decision to grant or deny benefits:

> (b) the action of the Secretary or his designee in allowing or denying a payment under this subchapter is --
>
> (1) final and conclusive for all purposes and with respect to all questions of law and

> fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. § 8128(b). However, Plaintiff maintains that application of this section to preclude judicial review of the Secretary's decision violates her constitutional rights that are protected by the Fifth and Fourteenth Amendments . Although we do have jurisdiction to resolve the issue of constitutionality of section 8128, Czerkies v. United States Dept. of Labor, 73 F.3d 1435 (7th Cir. 1996), Plaintiff's argument must nonetheless be rejected.

The law of this circuit is clear; congress' decision to preclude federal employees from seeking review of FECA is constitutional. Hancock v. Mitchell, 231 F.2d 652 (3d Cir. 1956)

("The Federal Employees Act expressly prohibits judicial review of the denial of payments thereunder . . . and is not unconstitutional in so providing"); see also Heller v. United States, 776 F.2d 92, 98 (3d Cir. 1985), cert. denied, 476 U.S. 1105, 106 S. Ct. 1948, 90 L.Ed.2d 358 (1986); Benton v. United States, 960 F.2d 19, 22-23 (5th Cir. 1992) (rejecting assertion that preclusion of judicial review under section 8128 was unconstitutional). Accordingly, we reject Plaintiff's argument that she suffered a constitutional deprivation through application of 5 U.S.C. § 8128.

An appropriate Order will issue.

/s/
William W. Caldwell
United States District Judge

ORDER

AND NOW, this 31st day of July, 1996, upon consideration of Defendant's motion to dismiss, filed May 17, 1996, it is Ordered that the motion is granted. The Clerk of Court shall close this file.

/s/
William W. Caldwell
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-7500

MARGARET L. O'DELL

Appellant

v.

ROBERT B. REICH, Secretary, Department of Labor; THE UNITED STATES GOVERNMENT

On Appeal from the United States District for the Middle District of Pennsylvania
(D.C. Civ. No. 96 -00270)
District Judge: Honorable William J. Caldwell

Submitted under Third Circuit LAR 34.1(a)
December 9, 1996

BEFORE: GREENBERG, LEWIS, AND MCKEE, Circuit Judges

JUDGEMENT ORDER

After consideration of the contentions raised by Appellant, it is

Adjudged and Ordered that the order of the district court entered July 31, 1996, be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT

/S/
Morton I. Greenberg
Circuit Judge

ATTEST;
/s/
P. Douglas Sisk, Clerk
DATED: December 23, 1996

Supreme Court, U.S.
FILED
MAY 20 1997

No. 96-1511

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARGARET L. O'DELL, PETITIONER

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR, AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Congress's preclusion of judicial review of administrative decisions allowing or denying benefits under the Federal Employees' Compensation Act violates the Due Process Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1511

MARGARET L. O'DELL, PETITIONER

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR, AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 8-9) is unpublished, but the decision is noted at 106 F.3d 386 (Table). The opinion of the district court (Pet. App. 1-8) is unreported.

JURISDICTION

The court of appeals entered its judgment on December 23, 1996. The petition for a writ of certiorari was filed on March 24, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner formerly worked at the Veterans' Administration Medical Center in Lebanon, Pennsylvania. Pet. App. 1. Petitioner alleges that she was exposed to toxic fumes during her work, and that the exposure resulted in lung disease. Pet. 2-3; Pet. App. 1, 4. In October 1988, petitioner filed a claim for benefits under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, which establishes a comprehensive workers' compensation scheme for federal employees who die or become disabled as a result of personal injuries sustained while in the performance of their duties. 5 U.S.C. 8102(a).

The Office of Workers' Compensation Programs (OWCP) in the Department of Labor, which administers FECA for the Secretary of Labor, 20 C.F.R. 10.2(a), granted petitioner certain medical benefits, but it denied her claim for disability benefits on a number of occasions. See Pet. App. 3-4; App., *infra*, 4a-6a.[1] The Department's Employees' Compensation Appeals Board (ECAB), which makes final decisions on appeals from OWCP's determinations, 5 U.S.C. 8149, affirmed the denials. See Pet. App. 4-5. On March 1, 1996, OWCP initially granted a request for reconsideration and awarded petitioner compensation for up to two days of missed work; but on March 29, 1996, the Director of OWCP, on his own motion, reversed that decision and again denied petitioner's disability benefits claim in full.

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[1] The various administrative decisions are not reproduced in the appendix to the petition. We have reprinted as an appendix to this brief (App., *infra*, 1a-6a) the March 29, 1996 decision denying disability benefits.

Petitioner sought review of that decision in the United States District Court for the Middle District of Pennsylvania. The district court dismissed the action. Pet. App. 1-8. The court pointed out that 5 U.S.C. 8128(b) provides that:

> The action of the Secretary or his designee in allowing or denying a payment under this subchapter is—
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

Relying on controlling appellate precedent, the district court rejected petitioner's argument that Section 8128(b)'s preclusion of judicial review "violates her constitutional rights that are protected by the Fifth and Fourteenth Amendments." Pet. App. 6.

The court of appeals affirmed without opinion. Pet. App. 8-9.

ARGUMENT

The United States, as sovereign, is immune from suit except to the extent that it consents to be sued. *E.g.*, *Hercules Inc.* v. *United States*, 116 S. Ct. 981, 985 (1996); *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994). In the case of federal employees who are injured on the job, Congress has not consented to suit. In the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, however, Congress has provided such employees with "the right to receive immediate, fixed benefits, regardless of fault and without need for litigation," under a comprehensive workers' compen-

sation scheme. *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 194 (1983).

Congress committed the administration of that scheme to the Secretary of Labor. See generally 5 U.S.C. 8120-8128, 8145, 8149. FECA benefits are an employee's exclusive remedy against the United States. See 5 U.S.C. 8116(c). And in 5 U.S.C. 8128(b), Congress provided that decisions reached by the Secretary under FECA are to be respected as "final and conclusive for all purposes and with respect to all questions of law and fact," and are "not subject to review by another official of the United States or by a court by mandamus or otherwise."

There is nothing constitutionally suspect about Congress's refusal to provide for judicial review under FECA. "[T]he United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts"; rather, "where a statute creates a right and provides a special remedy, that remedy is exclusive." *United States* v. *Babcock*, 250 U.S. 328, 331 (1919) (upholding preclusion of judicial review of administrative decisions refusing compensation for property allegedly lost in government service); see also *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81, 90 (1991) (in light of Section 8128(b), "the courts have no jurisdiction over [Federal Tort Claims Act] claims where the Secretary [of Labor] determines that FECA applies"); *United States* v. *Fausto*, 484 U.S. 439, 455 (1988) (civil service disciplinary actions); *Johnson* v. *Robison*, 415 U.S. 361, 367 (1974) (discussing review-preclusion provision formerly applicable to decisions concerning veterans' benefits); *Dismuke* v. *United States*, 297 U.S. 167, 171-172 (1936) ("The United States is not, by the creation of claims against itself, bound to provide

a remedy in the courts. It may withhold all remedy or it may provide an administrative remedy and make it exclusive, however mistaken its exercise.")

This Court has recognized a general "presumption favoring judicial review of administrative action." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984). That presumption, however, "may be overcome by specific language or [other] specific * * * indicator[s] of congressional intent." *Ibid.*; see also, *e.g.*, *Fausto*, 484 U.S. at 452. On two occasions, the Court has specifically cited Section 8128(b) as containing the sort of "unambiguous and comprehensive" language that Congress uses "when [it] intends to bar judicial review altogether." *Lindahl* v. *OPM*, 470 U.S. 768, 779-780 & n.13 (1985); see *Southwest Marine*, 502 U.S. at 90 (quoting *Lindahl*).

Several courts of appeals have also held that Section 8128(b) does not bar substantial "constitutional" challenges to OWCP's administration of FECA, as opposed to claims "seeking * * * benefits on the basis of an error of fact or law by" OWCP. *Czerkies* v. *United States Dep't of Labor*, 73 F.3d 1435, 1441 (7th Cir. 1996) (en banc); see *id.* at 1438 and cases there cited. Even if that proposition is true (but see *id.* at 1443-1448 (Easterbrook, J., concurring in the judgment)), it does not help petitioner in this case. Petitioner has had a full opportunity to present evidence and have her claims considered, leading to two written opinions from the Department of Labor's Employees' Compensation Appeals Board, followed by further consideration and action on her request for reconsideration by the Director of OWCP, acting on behalf of the Secretary of Labor. See App., *infra*, 3a-5a. Under these circumstances, petitioner cannot plausibly argue that she has been denied due process.

Nor is there substance to petitioner's suggestion (Pet. 13) that she has been denied the equal protection of the laws because private-sector employees covered by other workers' compensation systems might have access to the courts. Injured federal employees are not situated similarly to private employees for these purposes, because the United States' sovereign immunity protects it from any claim to which it has not consented. See *Lane* v. *Pena*, 116 S. Ct. 2092, 2098 (1996) ("sovereign immunity places the Federal Government on an entirely different footing than private parties" for purposes of the Rehabilitation Act of 1973); *Dahn* v. *Davis*, 258 U.S. 421, 431 (1922) (in the absence of FECA, federal employees "would be without remedy when injured by fault of the Government").[2]

Petitioner's arguments amount to nothing more than a "garden-variety claim for benefits," albeit partially "cloaked in constitutional terms." *Czerkies*, 73 F.3d at 1443; see also *id.* at 1439; compare Pet. 12. Judicial review of such a claim is precluded by Section 8128(b), and there is nothing unconstitutional about Congress's decision to preclude it. See *Benton* v. *United States*, 960 F.2d 19, 22 (5th Cir. 1992); *Paluca*

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[2] Petitioner asserts (Pet. 5-6) that "[t]he OWCP and ECAB were violating the provisions of the statute and their own policies and procedures." Even if that claim were judicially cognizable in light of Section 8128(b), compare *Hanauer* v. *Reich*, 82 F.3d 1304, 1307 (4th Cir. 1996) (court may review claim that agency violated a clear statutory mandate) with *Board of Governors* v. *MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991) (clear statutory rule sufficient to limit judicial review as prescribed in statute), it is without merit. Petitioner identifies no specific statutory violation in the consideration of her case, and we are aware of none.

v. *Secretary of Labor*, 813 F.2d 524, 527-528 (1st Cir.), cert. denied, 484 U.S. 943 (1987); *Czerkies*, 73 F.3d at 1443 (Easterbrook, J., concurring in the judgment), and cases there cited. We are aware of no case holding to the contrary, and the matter does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

J. DAVITT MCATEER
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor

MAY 1997

APPENDIX

In the matter of the claim for compensation under the Federal Employees' Compensation Act of:	: VACATE ORDER : REJECTION OF CLAIM
(Claimant) MARGARET O'DELL	: Case No. A3-137453
Employed by: Veterans Administration Lebanon, Pa.	:

Such investigation in respect to the above entitled claim having been made as is considered necessary, and after due consideration of such claim and reports this Office makes the following:

FINDINGS OF THE FACT[S]

That the Memo to the Director dated 3/29/96 be made a part hereof by reference.

Upon the foregoing findings of fact, it is ORDERED that the Reconsideration decision dated 3/1/96 be and is hereby VACATED by the Director on his own motion for the reason that the evidence submitted in support of Ms. O'Dell's 12/5/95 Reconsideration request is insufficient to estabiish work-related

disability and/or the existence of any work-related pulmonary condition.

Given under my hand at
Philadelphia, Pennsylvania
this 29 day of March, 1996.

By Order of the Director

By: /s/ ANN BAZIK
ANN BAZIK
Supervisory Claims
Examiner

MEMO TO THE DIRECTOR

The issue to be determined in this case is whether the Reconsideration decision dated March 1, 1996 should be vacated on the Director's own motion.

Section 8128 of the Federal Employees' Compensation Act (FECA), "REVIEW OF AWARD", states the following:

(a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may-

(1) end, decrease, or increase the compensation previously awarded; or

(2) award compensation previously refused or discontinued.

(b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is-

(1) final and conclusive for all purposes and with respect to all questions of law and fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

Credit shall be allowed in the accounts of a certifying or disbursing official for payment in accordance with that action.

Subject claim involves Margaret O'Dell, DOB 4/13/29, who was employed as a Nurse by the Veterans Administration, Lebanon, Pa. Her contention was that she was exposed to fumes at work because the Engineering Workshop was located directly below her office. Ms. O'Dell claimed exposure from 9/13/87 to 1/31/89; at which time she resigned. Her occupational disease claim was initially denied on 1/11/89. Subsequently, on 4/14/89, the claim was approved for exposure to fumes.

By formal decision dated 8/27/90, Ms. O'Dell's claim for disability and medical benefits was formally denied. Hearings and Review affirmed this decision on 1/4/91. A Reconsideration request was denied on 8/15/91. Another Reconsideration request was denied on 6/5/92. The Employees' Compensation Appeals Board affirmed the negative decision on 6/3/93. On 7/19/93, ECAB dismissed Ms. O'Dell's Reconsideration request. The District Office denied another reconsideration request on 1/3/94. The Employees' Compensation Appeals Board again affirmed the unfavorable decision in Ms. O'Dell's case on 7/3/95.

It should be noted that ECAB stated the following in their 7/3/95 decision: "By letter dated October 14, 1993, appellant stated that she enclosed reports dated September 30 and July 22, 1993 from Dr. Mitchell, as well as the results of pulmonary function tests. The record does not contain copies of these reports."

Ms. O'Dell sought a Reconsideration of the Board's 7/3/95 decision, and her request was denied by ECAB on 8/11/95. They stated the following: "The Director has reviewed appellant's July 26, 1995 petition . . . and notes that it fails to establish that the Board's July 18, 1995 decision contains either an error of fact or law. Instead, appellant is attempting to reargue her case in the guise of a petition for reconsideration. Under these circumstances, the Director submits that the Board should deny the petition."

It should be noted that Ms. O'Dell sent to the Board copies of Dr. Mitchell's 9/30/93 and 7/23/93 reports, as well as the pulmonary function study dated 4/23/93. Thus, while the Board did not have these reports when they rendered their 7/3/95 unfavorable decision, they *did* have the reports in question at the time they made their 8/11/95 unfavorable decision.

Ms. O'Dell again returned to the Board to appeal their 8/11/95 denial of her Reconsideration request. On 9/26/95, ECAB denied this request also.

Subsequently, Ms. O'Dell filed a Reconsideration request with the District Office on 12/5/95. The material submitted in support of her request consisted of Dr. Mitchell's 9/30/93 and 7/23/95 reports, and the pulmonary function study dated 4/25/93.

On March 1, 1996, a Compensation Order was issued, Modification in Part, stating that Ms. O'Dell is en-

titled to compensation for the period of 10/13/88 through 10/17/88, subject to waiting days.

The medical evidence submitted in support of Ms. O'Dell's 12/5/95 Reconsideration request is insufficient to establish that a pulmonary condition exists and/or that work-related disability is established. Dr. Mitchell took over Ms. O'Dell's care when Dr. Schaub left Johns Hopkins in 9/92. He would have no first-hand knowledge of Ms. O'Dell's condition/disability, if any, in 10/88, some 5 years earlier than his 1993 reports. Furthermore, when Ms. O'Dell sought medical treatment with Dr. Glesson, a Pulmonary Specialist at Hershey Medical Center, on 11/10/88, he'd reported: ". . . although beyond any doubt, this woman has had some exposure to some solvent fumes at her job, we are unable to identify a specific exposure which is likely to lead to lung disease. No specific arrangements for a revisit was made."

SUMMARY AND RECOMMENDATION: the Director, on his own motion, has the right to review an award decision, either for or against a claimant, as specified in Section 8128 of the Federal Employees' Compensation Act. In this case, the Reconsideration decision of 3/1/96 has been reviewed and a determination made to VACATE that decision. As stated above, the Board DID have access to Dr. Mitchell's 9/30/93 and 7/23/92 reports, as well as the 4/23/93 pulmonary function test, prior to the rendering of their 8/11/95 unfavorable decision. Additionally, this medical evidence which Ms. O'Dell submitted in support of her 12/5/95 Reconsideration request, is insufficient to establish that a pulmonary condition exists and/or that work-related disability is established.

Ms. O'Dell's only entitlement on this claim is for the payment of medical bills for the accepted condition of "exposure to fumes" from 10/13/88, the "date of injury" established on this occupational disease claim, to 8/27/90 when the claim for compensation and medical bills was denied.

By: /s/ ANN BAZIK
ANN BAZIK
Supervisory Claims
Examiner
3/29/96